
(1979) 03 AP CK 0015
In the Andhra Pradesh High Court
Case No : A.S. No. 363 of 1975

Dasari Venkanna	Vs	APPELLANT
Dasari Venkamma		RESPONDENT

Date of Decision : 30-03-1979

Acts Referred:

Evidence Act, 1872 — Section 40, 41, 42, 44

Citation : (1979) 03 AP CK 0015

Hon'ble Judges : Madhava Reddy, J;Jeevan Reddy, J

Bench : Division Bench

Advocate : C.N. Babu, for the Appellant; P. Ramakrishna Raju and Mr. G.V.L. Narasimha Rao, for the Respondent

Final Decision : Dismissed

Judgement

Madhava Reddy, J.—This appeal directed against the judgment and decree in O.S. No. 8/71 on the file of the Subordinate Judge. Tanuku is by the plaintiff therein. That suit was tried along with another suit O.S. No. 160/69. The plaintiff claims to be the adopted son of one Dasari Subbanna having been taken in adoption when he was about six months old. Dasari Subbanna's first wife is one Dasari Subbamma and the second wife is one Dasari Venkamma (1st defendant herein). The 2nd defendant is the daughter of Dasari Subbanna by his first wife. Dasari Subbamma died in the year 1955. Her husband Dasari Subbanna executed a registered document Ex. A-1 dated 1-9-1958 purporting to be an adoption deed giving his properties to the plaintiff. Dasari Subbanna died on 11-12-1958. After his death disputes arose between plaintiff and the defendants and consequently the plaintiff left the adoptive father's house and went and resided with his natural parents. The plaintiff's natural father as his next friend O.S. No. 26/1962 on the file of the Subordinate Judge, Eluru for a declaration of adoption and for recovery of properties both on the strength of the adoption and the registered document dated 1-9-1958, marked Ex. A-1. That suit was dismissed by the trial Court upon the finding that the, plaintiff was not the

adopted son of Subbanna. Even the appeal prefer against that judgment was dismissed confirming the findings of the trial Court. The present suit is instituted by the plaintiff after attaining majority inter alia pleading that his natural father who acted as his guardian and next friend, acted with gross negligence in not placing all the oral and documentary evidence in support of his case of adoption and in not taking the plea that even if the adoption were not to be true the plaintiff was entitled to the plaintiff A, B and C schedule properties as a person designate under the registered document Ex. A-1 dated 1-9-1958. According to him under Ex. A-1 he is entitled to the property whether it is construed as a settlement deed for a will even after the adoption fails. The findings in the earlier suit O. S. No. 26/1962 do not constitute resjudicata. It is his further case that item 18 of plaintiff A schedule, properties belongs exclusively to his adoptive father Subbanna but was purchased benami in the name of the 2nd defendant. So also items 25 and 26 though purchased in the name of 1st defendant were purchased from out of the joint family funds and as such belong to him exclusively under Ex. A-A1. Even items 27, 28 and 29 purchased by the 1st defendant after the death of Subbanna were purchased with the joint family funds. Hence the plaintiff was entitled to the said items. A few days before the death of Dasari Subbanna, a settlement deed marked Ex. B-1 dated 9-12-1958 was executed under which items 15-A and 15-B of the A schedule properties were gifted to the 2nd defendant. But on the date of the execution and even for some time prior to that Dasari Subbanna was not in a sound and disposing state of mind and consequently the said document is not valid and enforceable. The 2nd defendant does not get any right to the properties. Both the 1st and 2nd defendants who filed separate written statement primarily pleaded that the findings in the earlier suit O. S. No. 26/1962 constituted res-judicata that the plaintiff's natural father was not at all guilty of negligence muchless was he guilty of gross negligence in conducting the said suit. They denied that the plaintiff was the adopted son of late Dasari Subbanna and that any right accrued to him under Ex. A-1 it was also urged that Ex. A-1 was executed at the time when Dasari Subbanna was in a very weak mental condition and as such it was not valid. The 1st defendant also pleaded that Ex. B-1 settlement deed in favour of the 2nd defendant was not true and valid and that it was brought into existence by the 2nd defendant when the 2nd defendant was not in a sound and disposing state of mind. As regards the plaintiff schedule properties it was pleaded that except items 25, 26, 27, 28 and 29 of A schedule properties all other items were the self acquired properties of late Dasari Subbanna and that item 18 was purchases by Dasari Subbanna in the name of the 2nd defendant benami. Item 28 was sold by the 1st defendant to the 3rd defendant and the 3rd defendant in turn sold it to the 13th defendant. It was pleaded that in any event Ex. A-1 was not an adoption deed and that it did not confer any right on the plaintiff dehors the adoption. The 2nd defendant denied the right of the plaintiff in similar terms as the 1st attendant and claimed that item 18 was her stridhana property and that items 27 and 28 were acquired by the 1st defendant after Dasari Subbanna's death and that Ex. B-1 settlement deed was true and valid. As regards Ex. A-1 her stand is identical with that of the

1st defendant. The 3rd defendant who is the purchaser of item 28 of A schedule property pleaded that the 1st defendant was the true owner of the said property. The same was alienated by him in favour of the 13th defendant and that the plaintiff present suit was barred by res-judicata. The trial Court on an appreciation of the evidence on record found that the plaintiff's father who was his next friend in the previous suit O. S. No. 26/1962 was not guilty of negligence and therefore the findings in the said suit operated as res-judicata against the plaintiff in the present suit. It also held that the plea that the plaintiff was entitled to the suit properties as a person designata even if his adoption is not held to be true was untenable, for, that plea was available to the plaintiff in the previous suit and was not taken. The other suit that was tried along with the present suit was by the 1st defendant in O. S. No. 8/71 i. e. the second wife of late Dasari Subbanna against the 2nd defendant herein that is the daughter of late Dasari Subbanna by his first wife. That was a suit for partition on the footing that they alone are the heirs of late Dasari Subbanna and consequently entitled to a half share. In view of the above findings reached by it, the trial court while passing a preliminary decree for partition dividing the plaint schedule properties into two equal shares and allotting one such share to Dasari Venkamma the plaintiff in O. S. No. 160/69 (1st defendant in O. S. No. 8/71) dismissed the plaintiff-appellant's suit O. S. No. 8/71.

In this appeal, the principal contention of Mr. C. N. Babu, the learned counsel for the plaintiff-appellant is that the plaintiff as the validly adopted son of late Dasari Subbanna and that the natural father of the plaintiff who acted as his next friend was guilty of gross negligence in conducting the said suit in as much as he failed to adduce all the available oral and documentary evidence and also failed to take a plea which he was entitled to the suit properties as personal designate even if his adoption was not true and the findings in the previous suit did not constitute res judicata.

2. Admittedly the plaintiff had filed the previous suit O. S. No. 26/62 on the file of the Subordinate Judge, Eluru for declaration of adoption and for recovery of the very same plaint schedule properties. In that suit oral and documentary evidence was adduced to prove the plaintiff's case of adoption. The present Ex. A-1 registered document dated 1-9-1958 was also filed therein to prove the adoption and in particular to establish that even Dasari Subbanna had expressly acknowledged under that document that the plaintiff was his adopted son. It was further pleaded that under the Hindu Adoptions and Maintenance Act when an adoption deed is executed the adoption should be presumed to be true and valid and the burden of proving to the contrary lay on the person disputing such adoption, in the previous suit the question of adoption was squarely in issue and Ex. A.1 was also placed before the Court for consideration of its effect on the claim of the plaintiff to the declaration of adoption as well as his claim to recover the plaint schedule properties. In the present suit too the same issues are to be decided. Unless the findings in the previous suit are shown to be not binding on the plaintiff-appellant for one reason or other the said findings would certainly

operate as res-judicata. Mr. C. N. Babu has rightly contended that those findings cannot be held to be binding on the plaintiff who has now attained majority and filed the present suit it the next friend of the plaintiff who had instituted the previous suit during his minority is shown to have acted with gross negligence. Mr. Babu contends that though sec. 44 of the Indian Evidence Act speaks of only fraud or collusion as the grounds for avoiding any judgment or decree which is relevant under secs. 40, 41 and 42. In the case of a minor of the gross negligence of the party also would be a ground for avoidness of the judgment, decree of order of the Court and any such findings recorded in such suit would not operate res-judicata.

3. In *Gotepatti Subbanna vs. Gotepatti Narasamma* 27 MLJ 486 it was held that a minor is not bound by a decree passed against him if he is able to show that his guardian was guilty of gross negligence. Following the said judgment in *Chunduru Ponniyya and Others Vs. Rajam Viranna and Others*, it was held that "Whether the negligence of the guardian adlitem of minor is such as leads to the loss of a right which might have been successfully asserted if the suit had been defended with care, the minor can get the decree set aside even without proof of fraud or collusion.

The same decision was reiterated by a Bench of the Madras High Court in *Karri Bapanna and Another Vs. Sunkari Yerramma and Others*, . There, it was held that "although only fraud or collusion and not gross negligence is mentioned in S. 44 the principle involved is applicable to cases of gross negligence also". Sulaiman, J., speaking for the full Bench of the Allahabad High Court in *Mt. Siraj Fatima and Others Vs. Mahmood Ali and Others* stated as follows;--

The real basis of the binding character of a decree against a minor is the fact of his having been duly represented by a proper person, and not the mere existence of any formal order appointing a, guardian for him. Even when there be such an order, if the guardian does not properly represent him, the decree would not be binding. On the other hand, even if there be any defect in the formal appointment of a guardian, the decree would be binding up on him, if he is sufficiently represented and his interests are well protected. It seems to me that even where a guardian has been formally appointed, but he is grossly negligent in his duties, nor ceases to represent the minor properly and effectively, and the result is the same as if no proper guardian had been in existence. It is also the duty of the Court to see that the guardian appointed is a proper person who would safeguard the interests of the minor. If therefore the guardian ceases to take any interest in the case or is grossly negligent so as to sacrifice the interest of the minor, it cannot be said that the minor is still properly represented in the litigation. Wilful and wanton neglect on the part of the guardian disqualifies him. This also therefore appears to me to be a basis on which the evidence of a decree, against the minor can be allowed." Although apparently the Privy Council in *AIR 1937 1 (Privy Council)* purported to over rule the decision in *Karri Bapanna vs. Yerramma* 45 MLJ 324, a close reading of that

judgment would make it clear that the principle laid down in the above decisions was not dissented from. In fact that judgment far from dissenting from the ratio of the above decisions appears to have approved the principle as correct and applicable to the peculiar position in which the minors are placed and the care which is expected of guardians in dealing with their rights. However, their Lordships did not discuss those decisions observing;

Their Lordships are not concerned to discuss the validity of these decisions, or the illusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the negligent actings of their guardians is a special one, and in these cases the plaintiff in the second suit was also the plaintiff in the former suit, although in the earlier suit he or she had sued through a guardian. Their Lordships would only add that they are not prepared to agree with the view expressed in Karri Bapanna's case (45 MLJ 324) that the principle of S. 44, Evidence Act, can be extended to cases of gross negligence.

That the principle enunciated by the earlier decisions of the Madras High Court was not dissented from much less overruled by the Privy Council in Venkata Seshayya vs. Koteswara Rao AIR 1942 Mad. 384 and that is the preponderant opinion of the several High Courts has been very well brought out in a decision of a Bench of the Madras High Court in Peria Negamam Sri Lakshmi Vilasa Draviya Sagaya Nidhi Limited Vs. Varalakshmi Ammal, . After a reference to the reported decisions of the various High Courts the Bench held:

It is open to a minor to challenging a decree passed against him on the ground that his guardian had been grossly negligent in the conduct of the suit in which the decree was passed even in the absence of fraud or collusion.

Viswanatha Sastri, J., speaking for a Division Bench of this Court in Chatrati Sriramamurthi and Another Vs. Official Receiver, Krishna and Others while reiterating what was stated in Peria Negamam Sri Lakshmi Vilasa Draviya Sagaya Nidhi Limited Vs. Varalakshmi Ammal, stated what would amount to negligence or gross negligence of a guardian so as to entitle a minor to avoid the decree or order of the Court in the following words:--

Gross negligence on the part of a next friend or guardian adlitem of the minor in conducting or defending a suit to which he is a party, entitles the minor to challenge the decree passed against him and avoid its effects. The negligence must have been such as to result in the loss of a right which would have been successfully asserted if the suit had been conducted or resisted with ordinary care and prudence. It might consist in the omission to raise an available plea or to adduce available evidence to substantiate. If the next friend or guardian adlitem had been guilty of gross dereliction of duty, that is to say, if he had neglected to do what was plainly his duty, or did not omit to do something which no man of common honesty and ordinary prudence would have done or omitted,

then the minor would have a right to sue to set aside an adverse decision attributable to the guardian's breach of duty. The negligence of the guardian must be so serious or of such a character as to justify the inference that the minor's interests were not at all protected and in substance, though not in form, the minor went unrepresented at the trial.

We have therefore no hesitation in holding that notwithstanding the finding in the earlier suit O. S No. 26/62 which was a suit instituted by the minor through his next friend the findings therein do not operate as *res judicata* and the plaintiff is not precluded from seeking a declaration of either adoption or recovery of the plaintiff's properties in the present suit provided he establishes gross negligence on the part of his guardian or next friend. Though sec. 44 in turn does not entitle the avoidance of any judgment, decree or order of a Court except on grounds of fraud or collusion as laid down by the above decisions, gross negligence of a guardian or next friend is also a ground for such avoidance. The principle upon which the minor is held bound by the previous decision is that he can be represented by the guardian or his next friend for a suit cannot be instituted by or against a minor except through his guardian or next friend as the case may be. When the guardian or next friend does not act with due diligence, there is no representation on behalf of the minor. In the absence of any representation on behalf of the minor either because there was no guardian or next friend or because the person who has been so appointed has not acted or has acted with gross negligence, which results in the minor not being represented before the Court. Consequently any finding or judgment against the minor cannot be sustained as binding on such minor.

4. We therefore proceed to consider whether a substantive plea available to the plaintiff's next friend in the previous suit if not taken by his guardian or next friend could be deemed to have acted with gross negligence so as to entitle the plaintiff to avoid the finding and the decree in that suit.

5. Ex. A-1 dated 1-9-1958 is a registered document which is styled as a "Pattasweekara Patram". The contents of the said document however would not disclose either the date of the adoption or the performance of the ceremonies of giving and taking or contain the description of the plaintiff as an adopted son as such. All that they recite is that he was brought up when he was child, brought to the house of Dasari Subbanna and his first wife Dasari Subbamma when he was a child and that he was being brought up as an avurasa son ever since. Under that document he is declared entitled to all the properties belonging to the executant after the demise of both himself and his wife Dasari Venkamma and that he should look after them during their life time. As rightly held by the trial Court in the present suit as well as by the Court in the previous suit O.S. 26/62 that document does not establish the adoption as such though it is styled as a "Dattasweekara patrika", Mr. Babu, the learned Counsel for the appellant also did not stress this aspect. What he however contended was that the right to the property that was conferred under Ex. A-1 was not dependent upon the validity

of the adoption of the plaintiff. Even if the adoption was not true, from the document itself it is clear that the executant intended that the plaintiff should get the property as a persona designata. That such a right could be conferred and merely because the adoption failed the so called adoptee does not necessarily lose his right to the property under the document is well established, Suffice it to refer to the earlier decisions of the Madras High Court in the Court of Madras vs. Venkata Surya Mahipati Ramakrishna Rao ILR 20 Mad. 167. The Court considering the question whether a bequest made to "A B" avurasa son" knowing that A B was not his avurasa son" held that the misdescription was immaterial and that A B took the bequest. This view was approved in Sri Raja Rao Venkata Surya Mahipathi Rama Krishna Rao Bahadur vs. The Court of wards ILR 22 Mad. 383 (PC) in Nidhoomoni Debya vs. S. Sarada Pershad Mookerjee IA 253 (PC) and Anirudha Deb Raikat vs. Rajeswar Das IA 72 (PC) also a similar view was taken and this view was referred with approval by the Supreme Court in AL. PR. Ranganathan Chettiar Vs. AL. PR. AL. Periakaruppan Chettiar, . The Supreme Court declared "the question as to whether a disposition is to the person intended in a will as a persona designata or by reason of his filling a particular legal status which turns out to be invalid" is one of some difficulty. The question that arises in individual cases must ultimately depend on its own facts and the terms of the particular document containing the disposition. The question in all such cases is whether the gift of the property by the testator to a person who is referred to as having been adopted is one which is dependant on all the requisites of a valid adoption complied with or whether it is to a designated person notwithstanding that it was desired and expected that the requisite for a valid adoption were complied with. The distinction between what is description and what is the reason or motive for a gift or bequest may often be very fine, but it is distinction which must be drawn from a consideration of the language and the surrounding circumstances." In that case having regard to all the circumstances and the recitals in the document it was concluded that the intention of the testator was that the property must go to the persona designata therein and it was not dependent upon that person having a validly adopted son. Having regard to the dicta of the Supreme Court referred to above what we have to see it whether the disposition under Ex. A-1 by way of a settlement or by way of a will was intended by the executant to be in favour of the plaintiff only because he filled the position of a duly adopted son to him or as a persona designata. The relevant recitals in Ex. A-1 are to the following effect:--

[7. In vernacular.].....This document was executed more than two months prior to the death of Dasari Subbanna It is in evidence that the plaintiff was brought as a child to the house of Dasari Subbanna and he lived with him and only after his death he went to his natural parent's house. Dasari Subanna had no male issue either by his first wife or by his second wife. Though it does not appear that any ceremonies of giving and taking were gone through and the document itself does not recite that the

adoption was made on any particular date it is clear from the recitals therein that he intended to give his property to the plaintiff under the said document. Only the vesting of the property was to be postponed till after the death of both the the executant and his second wife Dasari Venkamma, The recitals clearly entitle the plaintiff to the properties though not immediately but certainly after the death of Dasari Subbanna and his second wife. It vests absolute rights in the plaintiff. Such plea was taken in the previous suit but it was not specifically taken. It would therefore appear that the plaintiff's father who acted as next friend in the previous suit ought to have taken this plea but has not taken the same. If such a plea was taken in our opinion the plaintiff would have succeeded in the said suit and would have been declared entitled to the property even if the declaration as to adoption were refused.

6. That however does not conclude the matter. Having regard to the evidence in the earlier suit what has to be established by the plaintiff in the present suit to succeeded is that the plaintiff next friend was grossly negligent: In this context it cannot be ignored that the plaintiff's next friend was no other than his own natural father. He had no interest adverse to that of the plaintiff either at the time of the institution of the suit or later. Though it is alleged by the plaintiff that his father as next friend did not adduce the entire oral and documentary evidence what that evidence is has not been stated by the plaintiff even now giving any material particulars either in the plaint or at any subsequent stage of the suit, nor is it that stated in the plaintiff's own deposition as P.W. 1 in support of this case. Even in his deposition he has merely made a bald statement that his father did not examine material witnesses and did not file the necessary documents. In the plaint he even went to the extent of alleging that his father had taken money from the 1st defendant and the 2nd defendant did not conduct the suit properly and he reiterated that allegation in his deposition. But there is absolutely no evidence to support this desparate allegation. We have no reason to hold that his natural father received any money from any of the defendants and acted against the interests of the minor plaintiff. That allegation of the plaintiff has remained unsubstantiated Even now the plaintiff has not adduced any further evidence in support of his plea of adoption. The only documentary evidence in this behalf even according to the plaintiff now is Ex. A-1. That document was filed even in the previous suit. Further from the averments in the present plaint from out of which the present appeal arises also it would appear that the plaintiff laid his claim mainly on the footing that he is the adopted son of late Dasari Subbanna and only alternatively he claimed the properties on the footing of Ex. A-1. If in the previous suit his father also primarily rested the plaintiff's right to the property on the strength of the adoption he cannot be held guilty of any negligence. Moreover it would appear from the evidence that the plaintiff's father appointed a senior counsel to conduct the suit and in that suit number of witnesses were examined and documents produced. When the trial Court decided against the plaintiff, an appeal was also preferred to this Court and the matter was entrusted to a senior lawyer. Even in the appeal the present plea

was not taken. Could the action of the plaintiff's next friend be said to be negligent in entrusting the matter to a senior counsel and in acting in accordance with his directions. No evidence has been let in to show that any particular instructions were given by the counsel and the natural guardian did not act according to the said directions. The case was not set *ex parte* at any stage. All the available evidence was adduced and the matter was argued and the decision was obtained on merits. It in those circumstances one of the pleas available to the parties was not raised by the counsel inspite of all the material being placed before the counsel in our considered view the guardian could not be said to have acted with gross negligence so as to entitle the minor to a void judgment and decree in the said suit.

7. In *Daiva Ammal and Others Vs. Selvaramanuja Nayakar and Others*, Madhavan Nair speaking for a Bench of the Madras High Court stated that what is expected of a trustee in dealing with the trust property in conducting the business of trust may be said to apply equally to the guardian of a minor and referred to the decision of the Chancery Division in *In Re. Speight Speight vs. Gaunt* CH D 727 (1838) which laid down that a trustee is bound to conduct the business of trust in the same way as an ordinary prudent man of business conducts his own and has no further obligation. He also referred to the decision in 42 CH D 674 (1889) *In Re Weall Andrews Vs. Weall* 42 CH D 674 (1889) wherein it was pointed out that a trustee may select solicitors and agents and so long as he selects persons properly qualified he cannot be made responsible for their intelligence and honesty, and applying the said principal to the case of guardian and considering the question whether the failure on the part of the counsel appointed by the guardian of the minor to take a plea available amounted to gross negligence of the guardian as such observed :

We are prepared to assume that the special aspect of the question of non-liability now presented before us escaped the notice of the lawyer who conducted the case. But the question is whether the guardian who has taken all the necessary steps to conduct the case properly and has entrusted the case to a lawyer can be said to be grossly negligent on account of the lawyer's failure to raise a legal point in defence which may well have been raised by him. It is not denied that the lawyer engaged was sufficiently competent to conduct the case, It is not attested that there was any collusion between the lawyer and the plaintiff or that he was in any other way remiss in conducting the case. It is not proved that the lawyer was not provided with sufficient funds to conduct the case. In these circumstances; is it reasonable to hold that the guardian has been grossly negligent in the conduct of the case if the lawyer fail, fails to raise a point of law which may well have been raised by him.

and answered it by saying :

In the circumstances of this case we think the guardian has done what could reasonably be expected of her, that she has defended the case with due care and that it will be improper to ascribe negligence to her in conducting it." Same is the

position in the present case. Even the plaintiff does not assert, muchless prove, that his father had not appointed a competent lawyer or that the Sawyer was not given necessary funds to conduct the case or that the lawyer failed to appear at the hearing as was the case in *Punnayya vs. Veeranna* I. L. R. 45 Mad. 425. The only ground for attributing negligence to the lawyer is failure on the part of the counsel to take a legal plea available to the minor. That in our opinion, in the absence of any other factor, cannot be deemed to be sufficient to hold that the guardian was guilty of gross negligence in conducting the case of the minor. Even educated persons in matters legal and in the conduct of court affairs must necessarily depend upon the counsel's advice. Having entrusted all the relevant papers and having given necessary instructions he can only abide by the advice of the counsel in the matter of taking the necessary pleas in support of his cause. If the lawyer has not taken a plea which ought to have been taken, that cannot be sufficient to hold that the guardian was negligent in the conduct of the case so as to render the findings and the decree in the previous litigation not binding on the minor.

8. In view of the above discussion, we have no hesitation in holding that the plaintiff appellant's natural father was not guilty of negligence in the conduct of the previous suit O. S. No 26/1962 on the file of the Subordinate Judge's Court, Eluru. Consequently, the findings therein operate as *res-judi-cata*. The plea that the plaintiff-appellant was entitled to the plaint schedule properties as a *persona designata* under Ex. A-1 was also available to him in the previous suit which might and ought to have been raised. As the failure to raise the plea cannot be attributed to the negligence of the guardian, the said plea is not now available, to the appellant. The present suit must therefore fail on the short ground that all the findings in the previous suit constitute *res judicata* and thereof was no fresh cause of action for plaintiff to file the present suit. This appeal therefore fails and is accordingly dismissed, but in the circumstances without costs. Appellant to pay the Court fee in this appeal.